ORIGINAL

NO. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth and Fourteenth Amendments permit the denial of a claim of ineffective assistance of counsel in a capital sentencing trial -- on the basis of a presumtion that counsel provided effective assistance -- where the record shows that counsel decided: (a) to present no evidence of mitigating circumstances, despite the available but univestigated evidence of very substantial mitigating circumstances; (b) to inform the jury and the court in the sentencing trial that "[w]e [the defense] have no evidence"; and (c) to present a closing argument which conceded the persuasiveness of the reasons for imposing death, provided no reasons for imposing life instead of death, and apologetically asked the sentencer to "consider imposing life despite there being no reason he could think of for doing so.

2. Whether the sentencing court's application of non-premeditated felony murder as an aggravating circumstance justifying the imposition of the death penalty conflicts with the Court's recent pronouncement in Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2733, 2747 (1983), prohibiting capital sentencing tribunals from treating as aggravating "conduct that actually should militate in favor of a lesser penalty."

3. Whether the Florida courts' procedural default rule, which is haphazardly applied in capital cases, can serve as an "independent and adequate state procedural ground" under Wainwright v. Sykes, 433 U.S. 72 (1977) and thus bar federal habeas corpus review of capital sentencing issues.

TABLE OF CITATIONS

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The Respondent, Louie L. Wainwright, by and through undersigned counsel, prays that the instant petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed July 18, 1983, be denied.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 709 F. 2d 1443 (11th Cir. 1983).

JURISDICTION

The judgment and opinion of the court of appeals was rendered on September 12, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment of the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . .to be confronted with the witnesses against him . . .and to have the assistance of counsel for his defense;

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. 10a-11a.

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's statement of the case for the limited purpose of the instant petition.

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE THE PROPER RULE OF THE PRESUMPTION OF ATTORNEY COMPETENCE IN THE ANALYSIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN A CAPITAL SENTENCING TRIAL BECAUSE THE ISSUE AS FRAMED WAS NOT PRESENTED BELOW.

The Petitioner is now complaining that the Eleventh Circuit's opinion rendered in the matter utilized a principle of law that attorneys are presumed to be competent. However, the Petition did not complain to the Eleventh Circuit by raising said issue in his petition for rehearing and/or suggestion for rehearing en banc (A 1). Therefore, this Court should not consider the contention now raised. E.g., United States v. Ortiz, 422 U.S. 891, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975).

Additionally, the Respondent submits that the Petitioner has misconstrued and misinterpreted the circuit court's opinion. Rather than relying on any presumption of attorney competence, the court utilized the standard of "whether counsel's decision to make a plea for mercy, in lieu of presenting any mitigating evidence, was one of strategy taken after he reasonably investigated other plausible options." (A 2c). The Petitioner's allegation that the court presumed, "without explicitly saying so," that counsel always conduct reasonably substantial investigation of plausible defenses is nothing short of fanciful. The court's statement that "there is no basis in this record for finding that counsel did not sufficiently investigate Adams'

background" was not a presumption but, rather, a legitimate comment on the record before the court that said record shows that counsel did investigate Adams' background. Such reasoning is in line with King v. Strickland, 714 F. 2d 1481 (11th Cir. 1983), although the record in King indicated the opposite result, to wit: that there were indications that counsel failed to sufficiently conduct investigation.

Since the burden of proof to establish ineffectiveness and prejudice is on the Petitioner, the Respondent submits that logic would necessitate a presumption of competence. After all, a defendant charged with a crime has a presumption of innocence until proven guilty by his accusers. Why should an attorney who has proven himself initially competent by meeting the standards of the State bar not be accorded the presumtion of remaining competent until proven incompetent by his accusers especially since a finding of incompetence could lead to the attorney losing his license and thereby his likelihood? The Respondent respectfully requests that this Honorable Court refrain from considering an issue not raised below and one that has only become an issue by the Petitioner's strained and convoluted reading of the opinion redered below.

II. THIS COURT SHOULD NOT GRANT CERTIORARI AS THE INSTANT ISSUE WAS NOT PRESENTED BELOW AND THERE IS NO CONFLICT WITH THE LOWER COURT'S OPINION AND ZANT V. STEPHENS.

When all is said and done, the fact of the matter is that the instant issue was not raised below (Petition, p. 9 n.4) and, therefore, is not properly raised herein.

In the court below, the Petitioner argued that his death sentence was disproportionate and excessive because it was based on felony murder without a specific finding of intent to kill. Zant v. Stephens, ___ U.S. ___, 103 S. Ct. ___, 77 L. Ed. 2d 235 (1983) dealt with the issue of whether a death sentence must be invalidated due to the failure of one aggravating circumstance when the death sentence is adequately supported by other aggravating circumstances. The Petitioner has taken isolated statements from Zant in an illogical attempt to show conflict between the instant opinion and Zant, supra. A fair reading of both opinions, paying attention to the issues involved in each, however, reveals that any conflict has been imagined by the Petitioner. In fact, the Respondent submits that the instant case falls within the ambit of Zant.

The function of statutory aggravating circumstances is to circumscribe the class of persons eligible for the death penalty. Zant, supra, 77 L. Ed. 2d at 250-251. The Florida legislature, in enacting section 921.141(5)(d), Florida Statutes (1973), defined, in part, the type of murder for which the death penalty may be imposed to be a murder committed while the defendant was engaged in certain enumerated felonies. The legislature, therefore, in its wisdom categorically narrowed

the types of murders to include murders committed during certain felonies as an effective deterent. See, Gregg v. Georgia, 428 U.S. 153, 184, 96 S. Ct. 2902, 49 L. Ed. 2d 859 (1976). The aggravating circumstance herein contested in a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. It cannot be said that the aggravating circumstance is too vague and nonspecific to be applied evenhandly by the sentencer. The Florida legislature has deemed felony murder to be deserving of death, contrary to the Petitioner's unsupported contention that in Florida felony murder is less deserving of death.

Since there is no conflict and the issue as framed was not presented below, the Respondent respectfully requests that this Court deny certiorari to entertain the issue.

III. THE COURT SHOULD NOT GRANT CERTIORARI AS FLORIDA DOES NOT HAPHAZARDLY APPLY THE PROCEDURAL DEFAULT RULE SO THAT FEDERAL HABEAS CORPUS REVIEW CAN BE BARRED.

A review of the cases cited by the Petitioner shows that the instant issue is wholly without merit. In Straight v. Wainwright, 422 So. 2d 827 (Fla. 1982), the procedural default rules was not even at issue as trial counsel obviously objected at trial to the limitation of consideration to statutory mitigating circumstance. It is beyond comprehension how the

Petitioner can interpret Straight to be a case in which the Florida Supreme Court declined to follow the procedural default rule. Since the court did not discuss trial counsel's failure to object at trial, the only logical and reasonable explanation is that the issue was properly preserved for appellate review. Accord, Douglas v. State, 373 So. 2d 895 (Fla. 1979); Demps v. State, 416 So. 2d 808 (Fla. 1982); Ruffin v. State, 420 So. 2d 591 (Fla. 1982); Hall v. State, 420 So. 2d 872 (Fla. 1982).

In Demps, Ruffin, and Hall, the supreme court did decline to entertain certain issues raised in the motions to vacate because they were either raised on direct appeal or could have been raised there. The Respondent submits that in refusing to entertain said issues, the court was following the procedural default rule.

Since the Petitioner has made a barebones allegation, totally unsupported by Florida case law, the Respondent respectfully requests that this Court deny certiorari to entertain the issue.

CONCLUSION

For the reasons expressed herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response To Petition For Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit has been furnished to RICHARD H. BURR, III, ESQUIRE, Assistant Public Defender, Attorney For Appellant, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier delivery this 30th day of November, 1983.

OF COUNSEL

NO. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5595

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Petitioner/Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent/Appellee.

On Appeal from the United States District Court
For the Southern District Court

PETITION FOR REHEARING AND/OR SUGGESTION FOR REHEARING EN BANC

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IN THE

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedent of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Godfrey v. Georgia, 446 U.S. 420 (1980); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), opinion modified and rehearing denied 706 F.2d 311 (11th Cir. 1983); Zant v. Stephens, __ U.S. __, 51 U.S.L.W. 4891 (June 22, 1983) (No. 82-89).

I also express a belief, based on a reasoned and studied professional judment, that this appeal involves the following questions of exceptional importance:

1. The panel's avoidance of a substantial question concerning the applicability of Wainwright v. Sykes to penalty issues in Florida death cases is a precedent-setting issue of great importance.

2. The panel's application of the same standard for determining whether a petitioner is entitled to an evidentiary hearing on a constitutional claim to a determination whether an indigent petitioner is entitled to funded expert assistance is a presendent-setting issue of great importance.

Assistant Public Defender
Attorney of Record for James Adams

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AUTHORITIES CITED

CASES CITED

STATEMENT OF THE ISSUES

A. ISSUES FOR REHEARING

1. Whether the panel opinion improperly characterizes a crucial state court conclusion of law as a finding of fact and thereby avoids the resolution of a direct violation of Lockett v. Ohio.

2. Whether the panel's decision erroneously holds that the failure to investigate the constitutional invalidity of prior out-of-state convictions can be treated as harmless error, since that doctrine may only be invoked where aggravating factors are invalid on state grounds under Barclay v. Florida.

B. ISSUES FOR REHEARING EN BANC

3. Whether the panel opinion's approval of the felony murder aggravating circumstance in this case directly conflicts with recent Supreme Court pronouncements concerning the necessary function of a statutory aggravating circumstance.

4. Whether the panel opinion is in direct conflict with Proffitt v. Wainwright and Godfrey v. Georgia in holding that this Court cannot entertain a challenge to the Florida Supreme Court's unprincipled application of a statutory aggravating circumstance in a particular case.

5. Whether the court's avoidance of a substantial question concerning the applicability of Wainwright v. Sykes to penalty issues in Florida death cases is a precedent-setting error of exceptional importance.

6. Whether the panel incorrectly applies the same standard for determining whether a petitioner is entitled to an evidentiary hearing on a constitutional claim to a determination whether an indigent petitioner is entitled to funded expert assistance, and thus presents a precedent-setting issue of exceptional importance.

STATEMENT OF PROCEEDINGS

Petitioner was sentenced to death on March 15, 1974. His conviction and death sentence were affirmed by the Florida Supreme Court[1] and the United States Supreme Court denied his petition for writ of certioari.[2] Petitioner moved for post-conviction relief on November 1, 1979.[3] Denial of that motion after an evideniary hearing was affirmed by the Florida Supreme Court,[4] and clemency was subsequently denied.

Upon his application for habeas corpus to the District Court for the Southern District of Florida, execution of a death warrant was stayed. The petition was denied by the District Court on February 17, 1982, and an appeal taken to this Court. The cause was orally arqued on March 1, 1982, and on July 18, 1983, the panel issued its opinion affirming the District Court's decision.

STATEMENT OF THE FACTS

The evidence at trial showed that on the morning of November 12, 1973, Edgar Brown was found injured in his room (T 441).[5] Apparently the perpetrator had entered the residence unarmed while no one was in the house (T 267, 324-325, 442-446). Sometime later, the deceased return home and discovered the perpetrator. There was a struggle, during which the deceased received injuries from a fireplace poker kept in the house. He died the next day. Premeditation was not an issue in this prosecution (T 1050).

[1] Adams v. State, 341 So.2d 765 (Fla. 1976)

[2] Adams v. Florida, 434 U.S. 878 (1977)

[3] In the interim, Petitioner's Gardner v. Florida, 430 U.S. 349 (1977) claim was decided adversely to him by the Florida Supreme Court, Adams v. State, 355 So.2d 1205 (Fla. 1978), cert. den. Adams v. Florida, 439 U.S. 947 (1978), reh. den. 440 U.S. 931 (1979).

[4] Adams v. State, 380 So.2d 423 (Fla. 1980)

[5] The following abbreviations are used: "T" = Trial transcript; "PCT" = Transcript of hearing on motion for post-conviction relief.

At the penalty phase of the trial, the State adduced evidence that Mr. Adams had been convicted of rape in 1963 in Tennessee, and was sentenced to ninety-nine (99) years in prison for that charge. At the hearing on Petitioner's motion for post-conviction relief, Mr. Wilkenson, an attorney who assisted trial counsel at the trial and then prepared the clemency, testified that Mr. Adams' rape trial was before a jury which may well have been the product of racially selective procedures. All the jurors were white, and the courtroom was racially segregated: Mr. Adams' family had to sit in the balcony. Mr. Adams himself was shackled throughout the trial, although there was no indication he acted in a way which would have justified such a prejudicial treatment, which was apparently standard procedure (PCT 20-21). Moreover, although Mr. Adams had testified at trial in response to the State's cross-examination that he had "five or more" convictions (T 926), Mr. Wilkenson readily discovered that only the 1962 rape conviction was legal (PCT 15,16). Two other misdemeanor convictions—all that there was record on—had been uncounselled and there had not been an offer of counsel.

ARGUMENTS AND AUTHORITIES

1. THE PANEL OPINION IMPROPERLY CHARACTERIZES A CRITICAL STATE COURT CONCLUSION OF LAW AS A FINDING OF FACT AND THEREBY AVOIDS THE RESOLUTION OF A DIRECT VIOLATION OF LOCKETT V. OHIO.

Mr. Adams argued that the sentencing judge expressly precluded the presentation of evidence of nonstatutory mitigating circumstances in violation of Lockett v. Ohio, supra, where prior to the sentencing phase of his trial, the judge held an off-the-record conference in chambers in which he said that he would admit only evidence of statutory aggravating and mitigating circumstances. Pet. Br., 50-53; Pet. Reply Br., 19-21. The Florida Supreme Court found the uncontradicted testimony of one of the trial lawyers establishing

this claim legally insufficient.

> "[W]e reject the claim that the sentencing process must be voided because of a tenuous recollection of assistant defense counsel[6] of an unrecorded conversation where there was no proffer of specific nonstatutory mitigating circumstances at the original trial."[7]

Adams v. State, 380 So.2d 423, 424 (Fla. 1980). Mr. Adams argued that this was a legal conclusion concerning the sufficiency of the evidence to establish the claim (not the facts) as a matter of state law, and accordingly, was not a fact finding to which the Court could defer under 28 U.S.C. §2254(d). Nevertheless, the panel treated this conclusion as a finding of fact ("[t]he state court's factual determination that the evidence did not support the claim is entitled to a presumption of correctness"), Panel Opinion, 4068, and swept the issue aside.

Mr. Adams submits that the panel fundamentally erred when it characterized the Florida Supreme Court's conclusion as a finding of fact. The state court's "finding" was instead a conclusion of state law, to which no deference should have been given. See, Sumner v. Mata, 455 U.S. 591, 597 (1982). The legal sufficiency of facts in this context, is always a federal question which must be determined independent of state-law-based conclusions. Once the "finding" by the Florida Supreme Court is properly characterized, it is clear that federal law compels precisely the

[6] As the panel appeared to recognize, defense counsel's recollection was not "tenuous." He testified that he recalled the conference, but that at first he was not certain whether it had occurred in Mr. Adams' or another client's trial. He confirmed (before testifying) with his co-counsel that this conference had occurred in Mr. Adams' trial. (PCT 14)

[7] The absence of a proffer is no indication that the judge did not so limit the presentation of mitigating evidence, however. At the time of Mr. Adams' trial (1974), the reasonable understanding in Florida was that the law properly required such a limitation. See, Proffitt v. Wainwright, supra, 685 F.2d at 1248 and n. 30; Foster v. Strickland, 707 F.2d 1339, 1347 (11th Cir. 1983).

opposite result from that reached by the Florida Supreme Court: Mr. Adams' established a serious violation of Lockett.[8]

Because the panel's erroneous procedural resolution of this issue precluded review of a clear Lockett violation, rehearing must be granted in order to avoid grave unfairness to Mr. Adams.

2. THE PANEL'S DECISION ERRONEOUSLY HOLDS THAT THE FAILURE TO INVESTIGATE THE CONSTITUTIONAL INVALIDITY OF PRIOR OUT-OF-STATE CONVICTIONS CAN BE TREATED AS HARMLESS ERROR, SINCE THAT DOCTRINE MAY ONLY BE INVOKED WHERE AGGRAVATING FACTORS ARE INVALID ON STATE GROUNDS UNDER BARCLAY V. FLORIDA.

The panel decision relied for its finding that Mr. Adams was not entitled to relief on his claim of ineffective assistance of counsel on an erroneous assumption that the record established adequate investigation by defense counsel into mitigating evidence. In actuality, the trial court effectively found that there was no investigation into critical matters of mitigation which could only be proven by recourse to witnesses who resided out-of-state. Thus, the trial court specifically grounded its denial of post-conviction relief on the following:

> "There is this problem about investigation; we heard that Mr. Wilkenson [assistant defense counsel] went all the way up to Tennessee and

[8] In his reply brief, at 19-21, Mr. Adams set forth the proper context in which to analyze this claim—as a claim of prejudice resulting from the non-recording of critical portions of his trial. While that analysis is sufficient, there is further corroboration that the trial judge indeed expressly limited the presentation of mitigating evidence. The trial judge gave the standard instruction concerning the scope of mitigating circumstances which could be considered—the very same instruction which the Court in Foster v. Strickland, 707 F.2d 1339, 1346-1347 (11th Cir. 1983) held to have limited the consideration of mitigating circumstances to those listed in the statute. Since, as the panel here observed, "it is reasonable to assume that the trial judge followed his own jury instruction," at 4067, this is still further confirmation that the judge believed that only statutory mitigating circumstances could be considered, and that he could well have made the non-record order at issue.

> researched the records and talked to lawyers and clerks and people up there. I know that what he was doing was acting sort of out of desperation in an attempt to salvage this case for [clemency], but whether trial counsel in an ordinary first degree capital case is obligated to travel all over the United States to investigate validity of convictions is something else. I'm not certain that he's required to do that." PCT 117-118, emphasis added.

Thus, the trial court did not find that defense counsel had exercised a strategic judgment, he found that there was no investigation because no investigation was required. Moreover, the attacks on Petitioner's prior convictions, which the panel agreed were used as aggravating circumstances to weigh in the life-death decision, were directed toward their constitutional invalidity. In Barclay v. Florida, ___U.S.___, 51 U.S.L.W. 5206 (July 6, 1983), the Supreme Court held, in a plurality opinion by Justice Rehnquist, that Florida's harmless error rule announced in Elledge v. State, 346 So.2d 998 (Fla. 1977), was not constitutionally objectionable, where the basis for rejecting aggravating factors found to exist by the trial court was grounded on impropriety as a matter of state law. But a different result must occur where, as here, constitutionally impermissible factors were considered in support of the imposition of a defendant's death sentence. Any consideration of constitutionally impermissible factors to justify a death sentence, then, represents error of constitutional magnitude which cannot be deemed harmless. See, Barclay v. Florida, 51 U.S.L.W. 5209-5210.

Defense counsel's failure to challenge the constitutional validity of Mr. Adams' three (3) previous convictions, including the rape conviction utilized as an aggravating circumstance, can thus in no wise be construed as harmless, since that failure fatally

infected the validity of Mr. Adams' death sentence.

Since the analysis of Barclay v. Florida herein made was not possible until that case was decided, which only recently occurred, it is respectfully suggested that rehearing be granted to avoid conflict with Barclay and the principles enunciated therein.

3. THE PANEL OPINION'S APPROVAL OF THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IN THIS CASE DIRECTLY CONFLICTS WITH RECENT SUPREME COURT PRONOUNCEMENTS CONCERNING THE NECESSARY FUNCTION OF STATUTORY AGGRAVATING CIRCUMSTANCE.

As the panel correctly recognized, Mr. Adams was indicted for and convicted only of felony murder. Panel Opinion, 4065. Under these circumstances, the sentencing court's subsequent reliance on the felony murder as an aggravating circumstance unconstitutionally permitted the sentencer to sentence Mr. Adams to death. In Zant v. Stephens, ___U.S.___, 51 U.S.L.W. 4891 (June 22, 1983) (No. 81-89), the Supreme Court held that

> "each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself....[The] aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."

Id. at 4894-4895 (emphasis supplied) (footnote and citation omitted). The panel opinion failed to apply this "constitutional standard" in rejecting Mr. Adams' challenge to the sentencing court's reliance on felony murder as a statutory aggravating circumstance.

Rather than applying this standard, the panel relied upon the Supreme Court's prior approval in Proffitt v. Florida, 428 U.S. 242 (1976), of the Florida death penalty statute, "including necessarily the use of this aggravating factor." Panel Opinion, 4066. Zant makes clear, however, that the facial validity established by

Proffitt is not enough. In application, the circumstance must "genuinely narrow the class of persons eligible for the death penalty" and "must reasonably justify the imposition of a more severe sentence on the defendant" in relation to others also found guilty.

The felony murder aggravating circumstance does not and cannot meet this standard in a case such as Mr. Adams'—where the conviction itself is based solely upon the felony murder. The finding of this circumstance in such a case does not "genuinely narrow" the class of persons thereby eligible for death. To be sure, it separates those convicted of felony murder from those convicted of premeditated murder. But it does not draw from the overall class of convicted murderers a narrower set of people whose murders are genuinely and rationally "more aggravated" than the others.

Further, the finding of this aggravating circumstance in a case such as Mr. Adams' does not "reasonably justify" imposition of death on Mr. Adams compared to persons convicted of premeditated murder. In Florida, quite to the contrary, those convicted of felony, as opposed to premeditated murder, have been deemed less deserving of death. See, McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977). Indeed, the Supreme Court itself has generally held that murders committed by those who did not possess "a conscious purpose of producing death," Lockett v. Ohio, 438 U.S. 586 (1978) (White, J., concurring in the judgment); see, Enmund v. Florida, ___U.S.___, 73 L.Ed.2d 1140 (1982), are less, rather than more, deserving of death. Accordingly, a person convicted solely of felony murder, while actually and legally less deserving of death, is mechanically made more deserving of death by the very fact of his conviction. Surely the requirement that a statutory aggravating

circumstance "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" cannot be satisfied by such anomalous results.

Consequently, rehearing en banc should be granted to resolve the conflict between the panel opinion and Zant concerning the constitutional validity of a death sentence based upon a statutory aggravating circumstance which violates the mandate of Furman

4. THE PANEL OPINION IS IN DIRECT CONFLICT WITH PROFFITT V. WAINWRIGHT AND GODFREY V. GEORGIA IN HOLDING THAT THIS COURT CANNOT ENTERTAIN A CHALLENGE TO THE FLORIDA SUPREME COURT'S UNPRINCIPLED APPLICATION OF A STATUTORY AGGRAVATING CIRCUMSTANCE IN A PARTICULAR CASE.

Mr. Adams argued on appeal that the "especially heinous, atrocious or cruel" statutory aggravating circumstance was applied in his case in violation of the principles of Godfrey v. Georgia, 446 U.S. 420 (1980). He framed this issue as follows:

> "Consistent with Godfrey, the Florida Supreme Court has accorded a limited construction to the 'heinous, atrocious, or cruel' circumstance. However, in violation of Godfrey, that limited construction was not applied in Mr. Adams' case."

Pet. Br., 36. By citation to Florida Supreme Court cases, he then demonstrated that the limited construction of this circumstance made it inapplicable to the facts of his case. Pet. Br., 36-37; Pet. Reply Br., 12-13. Through such an analysis, Mr. Adams demonstrated precisely the same violation of Godfrey that this Court had found in Proffitt v. Wainwright, 685 F.2d 1227, 1261-1265 (11th Cir. 1982), opinion modified and reh. denied, 706 F.2d 311 (11th Cir. 1983). However, the panel in Mr. Adams' case refused to address this issue as presented.

Instead of treating this issue as framed, the panel simply avoided it by recasting the issue as follows:

> "Although Adams aruges there are Florida cases with similar facts which were not held to be 'especially heinous, atrocious, or cruel,' it is not the rule of the federal courts to make a case-by-case comparison of the facts in a given case with other decisions of the state supreme court."

Panel Opinion, 4066. As the briefs for Mr. Adams made clear, however, he was not simply arguing inconsistency on the part of the Florida Supreme Court, as the panel opinion implies. He was arguing that the Florida Supreme Court permitted the unprincipled application of a statutory aggravating circumstance in his case, which thus deprived him of the critical "narrowing" function of such a circumstance. As Zant has reaffirmed, supra, the federal courts do have the role of preventing such unprincipled applications of statutory aggravating circumstances.

Accordingly, the panel opinion's treatment of this issue conflicts both with this Court's prior decision in Proffitt and with the Supreme Court's decision in Godfrey, as recently reaffirmed in Zant. In light of Zant, there can be no more serious deviation from mandatory constitutional principles in the context of a death penalty case.

5. THE COURT'S AVOIDANCE OF A SUBSTANTIAL QUESTION CONCERNING THE APPLICABILITY OF WAINWRIGHT V. SYKES TO PENALTY ISSUES IN FLORIDA DEATH CASES IS A PRECEDENT-SETTING ERROR OF EXCEPTIONAL IMPORTANCE.

One of the issues raised by Mr. Adams was one common to many other Florida death cases: whether the penalty phase instructions to the jury had the effect of precluding the jury's consideration of nonstatutory mitigating circumstances. Also in common with other capital petitioners, Mr. Adams had not objected to this instruction at trial and had not raised the issue on direct appeal. Following the issuance of Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)

(en banc), in which the Court applied Wainwright v. Sykes, 433 U.S. 72 (1977), to bar review of this same claim for the petitioner's procedural default, counsel for Mr. Adams extensively researched the Florida Supreme Court's death penalty decisions and determined that the Florida court did not adhere consistently to a procedural default rule respecting capital sentencing issues. Mr. Adams presented this research to the panel in a supplemental brief and requested leave to file it. No order was entered with respect to this request, however, and the panel opinion ignored the brief, finding Mr. Adams' procedural default to have barred review of the issue. Panel Opinion, 4068.

This question simply cannot be ignored any more. It is indisputable that Wainwright v. Sykes can bar otherwise meritorious claims. Accordingly, the proper application of the Sykes holding can literally be a matter of life or death for capital habeas corpus petitioners. If there is a question whether the Sykes doctrine applies at all to the penalty issues raised by Florida petitioners, it must be faced and resolved squarely.

Mr. Adams has attempted to show that there is very substantial question whether the Sykes doctrine applies at all to capital sentencing issues raised by Florida petitioners. In his supplemental brief, he has documented extensively the Florida Supreme Court's starkly inconsistent invocation of its own procedural default rules concerning capital sentencing issues. There can only be two conclusions drawn from this pattern: (1) there is no procedural default rule for such issues, or (2) if there is one, it is applied arbitrarily. In either case, Sykes would be inapplicable. If the state court routinely reaches the merits of issues—despite a seemingly applicable procedural default rule—

Sykes does not apply. County Court of Ulster County v. Allen, 442 U.S. 140, 147-154 (1979). And if the state court arbitrarily applies its procedural default rule in some but not all cases presenting the same defaults, there is authority for the proposition that such a practice cannot bar subsequent federal review of federal claims which the state court has thus held forfeited. See, Barr v. City of Columbia, 378 U.S. 146, 149-150 (1964); Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) (per curiam); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 456-458 (1958). Cf., Bass v. Estelle, 705 F.2d 121 (5th Cir. 1983).

Accordingly, this is an issue which demands resolution before the Court proceeds any further down the road of refusing to review otherwise meritorious claims for procedural default.

6. THE PANEL INCORRECTLY APPLIES THE SAME STANDARD FOR DETERMINING WHETHER A PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON A CONSTITUTIONAL CLAIM TO A DETERMINATION WHETHER AN INDIGENT PETITIONER IS ENTITLED TO FUNDED EXPERT ASSISTANCE, AND THUS PRESENTS A PRECEDENT-SETTING ISSUE OF EXCEPTIONAL IMPORTANCE.

In its opinion, the panel applied the same standard to be met by an indigent petitioner seeking funds for expert assistance to investigate and establish disproportionate application of the death penalty based on the race of the victim as would be applied to determine if the petitioner is entitled to an evidentiary hearing on his disproportionality claim. But utilization of this standard at the initial time when the request for funds to obtain expert assistance puts the cart before the horse: without the expert's data, an indigent petitioner will never be able to show the need for an evidentiary hearing so he would, ipso facto, never be able to show that he needs experts. A defendant with funds to retain his own experts, on the other hand, could readily establish the

necessary predicate and receive an evidentiary hearing on the issue.

Such financial discrimination between indigent criminal defendants and those who possess the means to protect their rights cannot be tolerated. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcript); Argersinger v. Hamlin, 407 U.S. U.S. 25 (1972); Bounds v. Smith, 430 U.S. 817 (1977) (right of prisoners to access to law libraries or professional assistance in habeas corpus proceedings). In Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), this Court itself recognized that where a defendant has the right to present mitigating evidence, the state has a coextensive affirmative duty to provide the funds necessary for production of the evidence. Id. at 1496. "The cost of protecting a constitutional right cannot justify its denial." Bounds v. Smith, 430 U.S. at 825, 97 S.Ct. at 1496.

Under what test is a claim for financial assistance to be assessed? In federal criminal proceedings, 18 U.S.C. §3006A(e)(1) authorizes the provision of "expert...services necessary to an adequate defense" upon a showing "that the services are necessary." The uniform interpretation of this statute by the Courts of Appeals is that the showing "that the services are necessary" is sufficiently made

> "...when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them."

United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973). See, also, Williams v. Martin, 618 F.2d 1021, 1025-1026 (4th Cir. 1980); United States v. Durant, 545 F.2d 823, 826-827 (2nd Cir. 1976); Brinkley v. United States, 498 F.2d 1137, 1143 (8th Cir. 1974);

United States v. Chavis, 476 F.2d 1137, 1143 (D.C. Cir. 1973); United States v. Tate, 476 F.2d 131 (6th Cir. 1969).

Mr. Adams met this test, and under the federal rule, he should have been provided the expert assistance requested. Moreover, since the federal rule was enacted "to implement the sixth amendment guarantee of the assistance of counsel," Proffitt v. United States, 582 F.2d 854, 857 (4th Cir. 1978) [citing 110 Cong. Rec. 445, 18521 (1964); 109 Cong. Rec. 14223 (1963)], the standard should be articulated for and applied to habeas corpus proceedings. See, Section 3006A(g) and 28 U.S.C. §2254. Because this issue is one which is of fundamental importance to all indigents called upon to defend themselves against criminal prosecution who desire to constitutionally challenge the validity of the proceedings against them, and because of the effect of the application of a single, stringent standard to determine an indigent's rights both after and before he has the opportunity to obtain evidence to meet that standard, the instant case presents a precedent setting issue of exceptional importance, so that en banc review is called for.

CONCLUSION

Petitioner respectfully suggests that this case meets every conceivable standard for rehearing and en banc rehearing. The panel clearly overlooked or misapprehended two issues, necessitating rehearing. Moreover, two of the en banc issues are clearly of exceptional importance, and the conflict between controlling precedent in this Circuit and the other two en banc issues could not be more apparent. The need for a fair and just resolution of these issues cannot be overstated, for James Adams' life literally hangs in the balance.

For the reasons stated herein, the petition for rehearing and suggestion for rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to ROBERT L. BOGEN, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier/mail, this 5th day of AUGUST, 1983.

Of Counsel